

ESSAYS
AND
TREATISES
ON MORAL, POLITICAL, AND VARIOUS
PHILOSOPHICAL SUBJECTS.

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FROM THE GERMAN BY THE TRANSLATOR OF
THE PRINCIPLES OF CRITICAL PHILOSOPHY.

IN TWO VOLUMES.

VOL. I.

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OF
THE INJUSTICE
OF
COUNTERFEITING BOOKS.

Vol. I.

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OF
THE INJUSTICE
OF
COUNTERFEITING BOOKS.

Those, who consider the publication of a book as the use of the property in a copy (whether the possessor came by it as a manuscript from the author, or as a transcript of it from an actual editor), and then, however, by the reservation of certain rights, whether of the author's, or of the editor's, who is put in possession by him, have a mind to limit the use still to this, namely, that it is not permitted to counterfeit it, can thereby never attain the end. For the author's property in his thoughts or sentiments (though it were not granted that such a property has place according to external laws) remains to him notwithstanding the counterfeit; and, as an *express consent* of the vendees of a book to such a limitation of their property cannot have place,*

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how

* Would an editor attempt to bind every body, who purchased his work, to the condition, to be accused of embezzling the property of another intrusted to him, if either intentionally, or by his inconsiderateness, the copy, which he purchased, were used for the purpose of counterfeiting? Nobody would consent to this; because he would thereby expose himself to every sort of trouble about the inquiry and the defence. The work would therefore remain upon the editor's hands.

how much less would a merely *presumed* one suffice to their obligation?

I believe, however, to have reason to consider the publication not as the trading with goods in *one's own name*; but as *the transacting of business in the name of another*, to wit, the author, and in this manner to be able to represent easily and distinctly the wrongfulness of counterfeiting books. My argument, which proves *the editor's right*, is contained in a ratiocination; after which follows a second, wherein *the counterfeiter's pretension* shall be refuted.

I.

Deduction of the Editor's Right against the Counterfeiter.

Whoever transacts another's business in his name and yet against his will, is obliged to give up to him, or to his attorney, all the profits that may arise therefrom, and to repair all the loss, which is thereby occasioned to either the one or the other.

Now *the counterfeiter is he*, who transacts another's business (the author's) and so on.

Therefore he is obliged to give up to the author, or to his attorney (the editor) etc.

Proof of the Major.

As the agent, who intrudes himself, acts in the name of another in a manner not permitted, he has no claim to the profit, which arises

arises from this business ; but he, in whose name he carries on the business, or another attorney, to whose charge the former has committed it, possesses the right, to appropriate this profit to himself, as the fruit of his property. Besides, as this agent injures the possessor's right by intermeddling *nullo jure* with other's affairs, he must of necessity pay all damages sustained. This lies beyond a doubt in the elementary conceptions of the law of nature.

Proof of the Minor.

The first point of the minor is, *That the editor transacts the business of another by the publication.* — Here every thing depends on the conception of a book, or of a writing in general, as a labour of the author's, and on the conception of the editor in general (whether he be attorney or not). Whether a book be a commodity, which the author, either mediately or by means of another, can traffic with the public, therefore, alienate either with or without reservation of certain rights ; or whether it is not rather a mere *use of his powers* (*opera*), which he can *concede*, it is true, to others, but never *alienate*? Again, Whether the editor transacts his business in his own name, or another's business in the name of another?

In a book as a writing the author *speaks* to his reader ; and he, who printed it, speaks by his copies not for himself, but *entirely* in

the name of the author. The editor exhibits him as speaking publicly, and mediates but the delivery of this speech to the public. Let the copy of this speech, whether it be in the handwriting or in print, belong to whom it will; yet to use this for one's self, or to traffic with it, is a business, which every owner of it may conduct in his own name and at pleasure. But to let any one *speak* publicly, to publish his speech as such, is as much as to say, to speak in his name, and, in a manner, to say to the public, A writer lets you know, teaches you etc, this or that literally by me. I answer for nothing, not even for the liberty, which he takes, to speak publicly through me; I am but the mediator of its coming to you; that is no doubt a business, which one can execute in the name of another only, but never in one's own (as editor). The editor furnishes in his own name *the mute instrument of the delivering of a speech of the author's to the public*;* but he can *publish* the said speech by *printing*, consequently show himself as the person, by whom the author addresses the public, but in the name of the author.

The second point of the minor is, That the *counterfeiter* undertakes the (author's) business, not only without any permission from

* A book is the instrument of the delivering of a speech to the public, not merely of the thoughts, as picture is the symbolical representation of an idea, or of an event. What is the most essential is, that it is no *thing*, which is then delivered; but an *opera*, namely, a speech, and that. In naming it a mute instrument, I distinguish it from the trumpet, which delivers the speech by a sound, as, for instance, the trumpet, nay, even the mouth of others.

the proprietor, but even contrary to his will. For as he is a counterfeiter, only because he invades the province of another, who is authorized by the author himself to publish the work; the question is, Whether the author can confer the same faculty on another, and consent thereto. It is however clear, that, as then each of them, the first editor and the person afterwards usurping the publication of the work (the counterfeiter), would manage the author's business with the same public, the labour of the one must render that of the other useless and be ruinous to both; therefore a contract of the author's with an editor with the reservation, to allow to another still the publication of his work, is impossible; consequently the author was not entitled to give the permission to any other (as counterfeiter), and the latter should not have even presumed this; by consequence the counterfeiting of books is a business totally contrary to the will of the proprietor, and yet undertaken in his name.

From this ground it follows, that not the author, but the editor authorized by him, is lesed. For as the former has entirely given up his right to the managing of his business with the public to the editor and, without reservation, to dispose of it otherwise; so the latter is the only proprietor of the transaction of this business, and the counterfeiter encroaches on the editor, but not on the author.

But as this right of transacting a business, which, if nothing particular has been agreed on concerning it, may be done just as well

by another, is not to be considered of itself as *inalienable* (*jus personalissimum*); the editor, as he is invested with full power, has the faculty of making over his right of publication to another; and as the author must consent to this, he, who undertakes the business from the second hand, is not counterfeiter, but rightfully authorized editor, that is, one, to whom the editor, who was put in possession by the author, has transferred his plenipotence.

II.

Refutation of the Counterfeiter's pretended Right against the Editor.

The question remains still to be answered, Whether, as the editor abalienates the work of his author to the public, the consent of the former (and of course of the latter, who gave him authority) to every use of it at pleasure, consequently to reprinting it, does not follow from the property in the copy, however disagreeable it may be to him? For gain perhaps enticed him to undertake with this risk the business of editor, without excluding the purchaser from it by an express contract, because this might have been hurtful to his business. — That the property of the copy does not furnish this right I prove by the following ratiocination:

A personal positive right against another can never be derived from the property of a thing only.

But

But the right of publishing a work is a personal positive right.

Therefore it never can be derived from the property of a thing (the copy) only.

Proof of the Major.

With the property of a thing is indeed conjoined the negative right, to resist any one, who would hinder me from the use of it at pleasure; but a positive right against a person, to demand of him to perform something or to serve me in any thing, cannot arise from the mere property of a thing. It is true this latter might by a particular agreement be added to the contract, whereby I acquire a property from any body; for example, that, when I purchase a commodity, the vender shall send it to a certain place free from expences. But then the right against the person, to do something for me, does not proceed from the mere property of my purchased thing, but from a particular contract.

Proof of the Minor.

One has a right in the thing, which he can dispose of at pleasure *in his own name*. But what he can perform but *in the name of another*, he transacts this business so, that the other is thereby bound, as if it were transacted by himself. (*Quod quis facit per alium, ipse fecisse putandus est*). Therefore my right to the transacting of a business in the name of another is a personal positive right, namely,

to necessitate the author of the business to guaranty something, to wit, to answer for every thing, which he has done by me, or to which he obliges himself through me. The publishing of the work now is a speech to the public (by printing) in the name of the author, consequently a business in the name of another. Therefore the right to it is a right of the editor's against a person; not merely to defend himself in the use of his property at pleasure against him; but to necessitate him to acknowledge and to answer for as his own a certain business, which the editor transacts in his name, — consequently a personal positive right.

The copy, according to which the editor prints, is a *work* of the author's (*opus*), and belongs totally to the editor, after he has purchased it, either in the manuscript, or printed, and can do every thing with it he pleases, and what can be done in his own name; for that is a requisite of the complete right in a thing, *id est*, property. But the use, which he cannot make of it but only *in the name of another*, (*videlicet*, the author), is a *business* (*opera*), that this other transacts by the proprietor of the copy, whereto besides the property a particular contract is requisite.

Now the publication of a book is a business, which can be transacted but in the name of another (to wit, the author, whom the editor presents as speaking to the public through him); therefore the right thereto cannot pertain to the rights, which adhere to the property of a copy, but can become rightful
but

but by a particular contract with the author. Who publishes without such a contract with the author (or, when he has already granted this right to another, as proper editor, without a contract with him) is the *counterfeiter*, who then leses the proper editor, and must make amends to him for all damages.

Universal Observation.

That the editor transacts his business of editor, not merely in his own name, but in the name of another,* (to wit, the author), and without his consent cannot transact it at all, is confirmed from certain obligations which, according to universal acknowledgment, he is laid under. If the author, after he had delivered his manuscript to the editor to be printed, and the latter had bound himself thereto, were dead; the editor has not the liberty to suppress it as his property; but the public has a right, in case of a want of heirs, either to force him to publish the book, or to give up the manuscript to another, who offers to publish it. For it is a business, which the author had a mind to transact with the public, and which he accepted as transactor. It was not necessary that the public should know of this promise of the author's,

* Though the editor is at the same time author, both businesses are different! and he publishes in the character of a trader, what he wrote in the character of a man of letters. But we may set aside this case, and restrict our exposition but to that, where the editor is not at the same time the author; it will afterwards be easy to extend the consequence to the first case likewise.

or to accept of it; it acquires this right against the editor (to perform something) by the law only. For he possesses the manuscript but on condition, to use it for the purpose of a business of the author's with the public; but this obligation towards the public remains, though that towards the author has ceased. Here a right of the public to the manuscript is not built upon, but upon a business with the author. Should the editor give out the author's work, after his death, mutilated, falsified or interpolated, or let the necessary number of copies for the demand be wanting; the public would be entitled to force him to more justness, and to augment the number of the copies, but otherwise to provide for this elsewhere. All which could not have place, were the editor's right not deduced from a business that he transacts between the author and the public *in the name of the former*.

To this obligation of the editor's, which will probably be granted, a right founded thereupon must however correspond, namely, the right to all that, without which that obligation could not be fulfilled. This is, That he shall exercise the right of publication exclusively, because the rivalry of others in his business would render the transaction of it practically impossible for him,

A copy of *works of art*, as things, which was rightfully acquired, may be imitated or otherwise modelled, and the imitations publicly sold, without the consent of the author or of him, whom he

his ideas. A drawing, which any one has delineated, or got engraved by another, or executed in stone, in metal, or in stucco, may be copied, and the copies publicly sold; as every thing, that one can perform with his thing *in his own name*, requires not the consent of another. *Lippert's Dactyliotec* may be imitated by every possessor of it, who understands it, and exposed to sale, and the inventor of it has no right to complain of encroachment on his business. For it is a work (*opus*, not *opera*, *alterius*) which every body, who possesses it, may, without even mentioning the name of the inventor, alienate, of course imitate, and use in public traffic in his own name as his own. But the writing of another is the speech of a person (*opera*), and whoever publishes it can speak to the public but in the name of this other, and say nothing more of himself, than that the author makes the following speech to the public through him (*IMPENSIS Bibliopole*.) For it is a contradiction, To make in his own name a speech which, according to his own notice, and conformably to the demand of the public, must be the *speech of another*. The reason why all works of art of others may be imitated for public sale, but books, which have their editor already put in possession, dare not be counterfeited, lies in this, That the former are *works* (*opera*), the latter *acts* (*facta*), those may be as things existing of themselves, but these can have their existence only in person. Consequently these belong to

to the person of the author exclusively;* and he has an inalienable right (*jus personalissimum*) always to speak himself through every other, that is, nobody dares make the same speech to the public but in his (the author's) name. But when one alters (abridges, augments, or retouches) the book of another so, that it would now be even wrong to give it out under the name of the author of the original; the retouching *in the proper name* of the publisher is no counterfeit, and therefore not prohibited. For here another author transacts by his editor another business than the first, and consequently does not intrench on his business with the public; he represents not that author, as speaking through him; but another. The translation into another language cannot be held a counterfeit; for it is not the same speech of the author, though the thoughts may be exactly the same.

Were the idea of a copyright, or of the publication of books in general, bottomed upon here, well-understood, and elaborated
(as

* The author and the proprietor of the copy may both say of it with equal right: it is my book! but in a different sense. The former takes the book as a writing, or a speech; the latter as the mute instrument merely of the delivering of the speech to him, or to the public, that is, a copy. This right of the author's however is no right in the thing, namely, the copy (for the proprietor may burn it before his face); but an innate right, in his own person, to wit, to hinder another from reading it to the public without his consent, which consent can by no means be presumed, because he has already given it exclusively to another.

(as I flatter myself it is possible) with the elegance requisite to the Roman juridical learning; the complaint against the counterfeiter might be brought before a court, without first needing to ask on that account for a new law.